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WEDDING GALORE SDN BHD v. RASIDAH AHMAD

HIGH COURT MALAYA, SHAH ALAM
AMELIA TEE ABDULLAH J
[CIVIL APPEAL NO: 12B-298-12-2014]
6 MAY 2016

B

INTELLECTUAL PROPERTY: *Copyright – Infringement – Photographs taken from owner's Facebook without owner's approval and consent – Owner's watermark on photographs removed – Photographs printed in brochures and distributed – Whether photographs eligible for copyright – Whether there was infringement of copyright – Whether order for public apology on internet and/or social media within jurisdiction of Sessions Court – Whether damages awarded appropriate – Copyright Act 1987, s. 26(2)*

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The appellant was a wedding planner and a wedding outfit supplier while the respondent carried on a business of providing photography services for, among others, weddings, engagements and birthdays. In August 2013, the respondent was engaged by a client to provide photography services for a pre-wedding shot. In November 2013, the appellant (i) had taken two photographs of the respondent's client wearing wedding outfits from the respondent's Facebook without approval and consent; (ii) removed the respondent's watermark on the said paragraphs; and (iii) printed them in sales brochures for use at a wedding carnival without any reference or credit given to the respondent. This prompted the respondent to file an action at the Sessions Court against the appellant on the contention that, *inter alia*, the appellant had infringed their copyright in the said photographs or photographic works for the appellant's business. According to the appellant, it (i) found two edited photos of the wedding couple in Facebook where the wedding couple was wearing the outfit supplied to them by the appellant on hire; and (ii) downloaded the two photos and included them in 300 copies of sales brochure that it had printed. The Sessions Court Judge ('SCJ') allowed the respondent's claim and (i) ordered the appellant to make a public apology on Facebook; and (ii) awarded general, aggravated and exemplary damages. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the two edited photographs were eligible for copyright; (ii) whether the appellant had infringed the respondent's copyright by printing and distributing the two photographs without the permission or approval of the respondent; (iii) whether the order for a public apology on Facebook was within the jurisdiction of the Sessions Court; and (iv) whether the damages awarded were exorbitant.

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Held (dismissing appeal):

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(1) The respondent was entitled to the copyright of the two edited photographs as she was the photographer who had taken the original photographs. Applying s. 26(2) of the Copyright Act 1987, the copyright

shall be deemed to be transferred to the client subject to any agreement between the parties, excluding or limiting such transfer. The terms and conditions attached to the invoice clearly stated that the photographs taken would be considered the intellectual property of the respondent. *Vide* cl. 9, the agreement between the client and the respondent excluded the copyright to the photographs passing to the client unless the client pays the respondent RM1,000. However, the client did not buy the copyright of the photographs (paras 28 & 36)

(2) Since the respondent's photographs were printed in the appellant's brochure and without the respondent's watermark, no one looking at the said photographs would be aware that the said photographs belonged to the respondent. By removing the respondent's watermark on the photographs or cropping the photographs, the appellant was aware that the copyright in the said photographs belonged to the respondent. Therefore, the appellant was guilty of infringing the respondent's copyright by publishing the respondent's photographs in the wedding carnival brochure without her consent or without identifying the respondent as the author and copyright owner. (paras 41 & 43)

(3) In these days of the internet and social media, the publication of a public apology in the social media would serve as an effective way of assuaging the loss of hurt that the respondent suffered as a result of the infringement of her copyrighted work. Such an order made would be well-within the jurisdiction and discretion of the court to order such relief that the court deems just and fair. (para 52)

(4) Taking into account all the circumstances of the case and specially noting the conduct of the appellant, the SCJ was not in error when he awarded a sum of RM10,000 as general damages and a further sum of RM10,000 as aggravated damages. Both awards were thus affirmed. (para 58)

Case(s) referred to:

Azhar Victor v. Malaysian Airlines System Sdn Bhd [2012] 8 CLJ 563 HC ***(refd)***
Boucas v. Cooke (1903) 2 KB 227 ***(refd)***
Eastern Book Company & Ors v. DB Modak & Anor (2008) 1 SCC 1 ***(dist)***
Goodyear Tire & Rubber Company & Anor v. Silverstone Tire and Rubber Co Sdn Bhd [1994] 1 CLJ 509 HC ***(dist)***
Lachman v. Pyarchand AIR 1959 Raj 169 ***(refd)***
Lam Soon (M) Bhd v. Forward Supreme Sdn Bhd & Ors [2001] 4 CLJ 673 HC ***(refd)***
Macmillan and Company Ltd v. K & J Cooper (1924) 26 BOMLR 292 ***(dist)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals [1995] 2 CLJ 912 CA ***(refd)***
Sherinna Nur Elena Abdullah v. Kent Well Edar Sdn Bhd [2011] 1 LNS 1928 HC ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Syed Ahmad Jamal v. Dato Bandar Kuala Lumpur [2011] 2 CLJ 569 HC ***(refd)***
Tele-Direct (Publications) Inc v. American Business Information, Inc [1998] 2 FC 22 ***(refd)***

A *Ultra Dimension Sdn Bhd v. Ketua Pengarah, Lembaga Penggalakan Pelancongan Malaysia & Ors [2010] 8 CLJ 245 HC* ***(refd)***
Yardley v. Houghton Mifflin Co, Inc 108 F.2d 28 (1939) ***(refd)***

Legislation referred to:
Copyright Act 1987, ss. 7(3), 25(2)(a), 26(2)

B *For the appellant/defendant - Arvin Kasi & Nicole Lee; M/s Esther Ong, Tengku Saiful & Sree*
For the respondent/plaintiff - Sara Idylla Isbah; M/s Ahmad Rizal, Sara Idylla & Co

Reported by Najib Tamby

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JUDGMENT

Amelia Tee Abdullah J:

[1] This is an appeal from the decision of the learned Sessions Court Judge ("HMS") where the HMS had allowed the claim of Rasidah binti Ahmad
D (Menjalankan perniagaan dengan nama dan gaya LOOKitLOVE Photography) ("the respondent/plaintiff") against Wedding Galore Sdn Bhd ("the appellant/defendant"), for a declaration that the plaintiff is the owner of the copyright to the two photographs which were edited by the defendant and reproduced in the defendant's sales brochure, and ordering the defendant
E to pay the plaintiff general damages of RM10,000, exemplary damages of RM20,000, aggravated damages of RM10,000, interest at the rate of 5% per annum from the date of the writ until full settlement and costs of RM5,113. Being dissatisfied with the order of the learned HMS, the appellant/defendant had filed an appeal to the High Court against the said decision.

F **[2]** After hearing the submissions of the parties, the court had on 30 March 2015 upheld the decision of the HMS in respect of liability. The awards of RM10,000 for general damages and RM10,000 for aggravated damages were maintained as was the order for a public apology in Facebook. The order for RM20,000 in exemplary damages was set aside. The appellant
G was ordered to pay to the respondent costs of RM5,000. The following constitutes the grounds for the court's decision.

Background Facts

[3] The respondent is the sole proprietor of a business known as
H LOOKitLOVE Photography which carries on a business of providing photography services for various functions such as weddings, engagements, birthdays and also personal photography. The appellant is a wedding planner and a wedding outfit supplier.

[4] In August 2013, the respondent was engaged by Puan Nurashikin binti
I Jamal to provide photography services for a "majlis pra-perkahwinan, pernikahan, persandingan, majlis bertandang dan penggambaran luar dan pasca majlis" on 17 August 2013, 24 August 2013 and 25 August 2013.

[5] On or about 7 November 2013, the appellant had taken two photographs of the respondent's clients wearing wedding outfits (P15 & P16) from the respondent's Facebook without approval and consent, removed the respondent's watermark on the said photographs and printed them in sales brochures for use at a Wedding Carnival at Bangi Gateway without any reference or credit being given to the respondent.

[6] Thus the respondent filed an action against the appellant for declaratory and other reliefs alleging that the appellant had infringed their copyright in the said photographs or photographic works for the appellant's business. The respondent claims that she had suffered hardship, losses and difficulties as a result of the infringement. Her relationship with her client was also affected as she was, at the material time of the infringement, in the process of completing the client's wedding album.

[7] The appellant states that it had found two edited photos of the wedding couple in Facebook where the wedding couple was wearing the outfit supplied to them by the appellant on hire. The appellant recites as a fact that it had downloaded the two photos and included them in a sales brochure that it had printed. There is an admission that 300 copies of the brochure were printed.

Whether The Two Edited Photographs Are Eligible For Copyright?

[8] The first issue to consider is whether the two edited photographs are eligible for copyright protection and if so, whether the respondent is the owner of the copyright.

[9] The respondent takes the position that the photographs in P15 and P16 are artistic works made by her and that they are eligible for copyright. Reference was made to the case of *Sherinna Nur Elena Abdullah v. Kent Well Edar Sdn Bhd* [2011] 1 LNS 1928 where Stephen Chung Hian Guan JC had reason to deal with the issue of whether the plaintiff, whose photographs were used by the defendant in its packaging products, is the rightful owner of the copyright of her own photograph and image. In that case His Lordship had held as follows:

> Section 7(1)(c) of the Copyright Act 1987 provides that artistic works shall be eligible for copyright. "Artistic work" is defined in s. 3 of the Act to mean (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality. Therefore **a photograph or other photographic image is eligible for copyright**. Section 10(1) provides that copyright shall subsist in every work eligible for copyright of which the author or in the case of joint authorship, any of the authors is, at the time when the work was made, a qualified person ... And **under s. 3 of the Act, "author" is defined as "(d) in relation to photographs, means the person by whom the arrangements for the taking of the photographs were undertaken**.
>
> ...

> In the instant case, the Plaintiff was not the photographer or author of the photograph or image which was used by the Defendant on its products. The Plaintiff did not claim that she arranged or took or produced the photograph or image. What she has said in her affidavits is that she verily believes that she is one of the three women shown in the photograph or image and she was advised by her solicitors and verily believes that she is the rightful owner of her photograph or image which appeared on the Defendant's packagings.
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> (emphasis added)

[10] Thus, in the case of *Sherinna Nur Elena Abdullah* (*supra*), the court found that since the plaintiff had not shown that she is the owner of the copyright in the photograph or image used by the defendant, she cannot sue and has no *locus standi* to sue the defendant for infringement of the copyright.

[11] Section 7(3) of the Copyright Act 1987 provides that a literary, musical or artistic work shall not be eligible for copyright unless:

(i) sufficient effort has been expended to make the work original in character; and

(ii) the work has been written down, recorded or otherwise reduced to material form.

[12] Learned counsel for the respondent submits that the two photographs P15 and P16 fall within the category of artistic works. There is no issue that the work has been reduced to material form, namely photographs. Thus, the only issue appears to be whether sufficient effort has been expended to make the work original in character.

[13] In this regard, the court notes the evidence of the respondent/plaintiff appearing in the notes of proceedings. Rasidah binti Ahmad is a professional photographer and the sole proprietor of LOOKitLOVE Photography. According to her evidence, she has had wide professional experience in the field of photography. In early 2013, she was a special guest during an episode of 'Malaysia Hari Ini' (See photographs at pp. 171-172 @ P6). In mid 2013, Harian Metro had an exclusive interview with her pertaining to the photographing of newborn babies (See P3 at pp. 156-160 of the Appeal Records). She had also been featured in the August and September 2013 edition of Majlis Inspirasi Majlis Perkahwinan (See P4 and P5). She had organised the 'KL Instagram Outing' on 24 June 2012 (P7) where LOOKitLOVE was listed as the organiser and the 'Penang Instagram Outing' on 16 March 2013 (P8) where LOOKitLOVE was listed as one of the organisers. Reference was also made to the 'Charity Outing Portrait Photography Learning and Sharing Session' which was held on 13 May 2014 (P9) where LOOKitLOVE was again the organiser. From the above recounting, the court can accept that the respondent was somewhat of a acclaimed celebrity and highly regarded in the field of photography.

[14] The court notes that the respondent had also described how she had edited two photographs of Nurashikin binti Jamal and her husband. In her evidence, she testified that she had:

> ... menggunakan perisian Adobe Photoshop di mana saya telah menaikkan warna gambar, menggunakan "stamp tool" untuk menyeragamkan latar belakang gambar, melicinkan kulit muka dengan menggunakan "blurring tools". Saya juga telah menggunakan "tools brush, cropping tone" untuk mendapatkan gambar yang cantik. Setiap "tools" yang digunakan perlu dibuat di atas beberapa "layer" atau lapisan gambar di atas gambar asal. Setelah semua kerja-kerja mengedit gambar tersebut selesai, barulah saya letakkan tera air untuk dimuat naik di dalam website atau laman web social "Facebook".

[15] As such, learned counsel for the respondent has submitted that the respondent had made sufficient efforts to make P15 and P16 an original work. Further, the addition of the 'LIL' watermark on the photographs would have shown that the owner of the photographs was the respondent.

[16] On this issue, the appellant had questioned whether the respondent had put in sufficient work by her editing to make the edited photographs original in character. It was submitted that the only difference between the pre-edited photographs and the edited photographs were that the edited ones were slightly dimmer. In his written submissions, learned counsel for the appellant had complained the respondent had failed to give further details of her use of the tools such as stamp tools, blurring tools, tools brush and cropping tone.

[17] Based on this, the appellant sought to argue that the editing done by the respondent on the photographs and the labour engaged in doing so was too minimal to qualify the edited works as an original work that was entitled to copyright under s. 7(3) of the Copyright Act 1987.

[18] The appellant had cited numerous authorities allegedly in support of its argument. In the case of *Lam Soon (M) Bhd v. Forward Supreme Sdn Bhd & Ors* [2001] 4 CLJ 673; [2001] 6 MLJ 651, the plaintiff had applied for an interim injunction to restrain the defendants from using the Lam Soon Knife label based on passing off and infringement of its copyright in the Lam Soon Knife Label. In that case the defendant had contended that they were entitled to use a label which contained the same features, their entitlement being based on the assignment of one Whang Tar Choung, the proprietor of the registered trade marks which comprise an identical knife device. In that case, the court had found that Whang Tar Choung was the legal owner of the trade marks which he had assigned to the defendant. The assignment was effected together with the goodwill associated with the trademarks which must necessarily comprise the form in which the marks were previously used under license from Whang Tar Choung. As such, the court found no triable issues in respect of the copyright infringement.

[19] In the face of the fore-going facts, the plaintiff in *Lam Soon* (*supra*) had sought to claim that the 'Lam Soon Knife Label' was protected as an artistic work. In determining this issue, the court had found that the primary feature of the label is the knife device encased in a circle. The court found that the drawing or expression of the knife device was identical to the first defendant's two trademarks which had been registered since 1974. As such, the court found that the plaintiff's knife device which was used after 1974 could hardly be considered as original.

[20] In the circumstances, based on the differing facts from our instant case, the case of *Lam Soon* (*supra*) cited by learned counsel for appellant/defendant could hardly be considered as a good or relevant authority.

[21] Another authority cited by the appellant was the Canadian case of *Tele-Direct (Publications) Inc v. American Business Information, Inc* [1998] 2 FC 22. However, learned counsel had not indicated whether the Canadian legislation is in *pari materia* with our Malaysian law. In any event, this court is of the considered view that the Canadian case, which dealt with whether the organisation of the subscriber information in Yellow Pages directories and the collection of additional data such as facsimile numbers, trademarks and number of years in operation was sufficient to support a claim for originality in compilation, could be considered as a relevant or suitable authority to follow in our instant case.

[22] The case of *Macmillan and Company Ltd v. K & J Cooper* (1924) 26 BOMLR 292 cited and relied upon by learned counsel for the appellant revolves round the issue of whether the appellants in that case were entitled to the copyright of a certain book published by them entitled *"Plutarch's Life of Alexander.* Sir Thomas North's Translation. Edited for Schools by HWM Parr, MA" and whether the respondents by their publication subsequently in the year 1918 of their book entitled "*Plutarch's Life of Alexander the Great* North's Translation, edited with introduction, Marginalia, Notes and Summary by A Darby, MA" had infringed their copyright. The issue before the court there was whether the appellants' book was entitled to copyright because if there was no copyright, there would be no issue of any infringement by the respondents.

[23] In *Macmillan and Company* (*supra*), the text of the appellants' book contained a number of detached passages, selected from Sir Thomas North's translation with words being, in some instances, introduced to knit the passages together so that the text would present the form of an unbroken passage. The text of the appellants' book contained about 20,000 words and contained much more printed matter which were omitted from the respondents' book, namely, marginal notes, an introduction dealing with North's translation and Alexander's place in history, an analysis of the book's contents, a chronological table setting forth the principal dates in Alexander's life and a few short notes introduced into the text.

[24] In coming to a decision in that case, Atkinson J had stated as follows:

> What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of the case, and must in each case be very much a question of degree. But their Lordships have no hesitation in holding that there is no evidence in the present case to establish that an amount of these several things has been applied to the composition of the text of the appellants' book, as distinguished from the notes contained in it, to entitle them to the copyright of it.

[25] In that case, their Lordships found that the appellants were not entitled to copyright in the text of the book extending from pp. 1 to 82 inclusive, but were entitled to copyright in the notes printed in pp. 83 to 94, both inclusive.

[26] This court is of the view that the case of *Macmillan and Company* (*supra*), whilst instructive, would not lend much assistance to our instant case as the facts are totally different. Whilst the appellants' in *Macmillan and Company* (*supra*) had taken extensively from the book by Sir Thomas North, the respondent in our instant case was the very photographer who took the two photographs which she subsequently edited complete with watermark before downloading it into her Facebook webpage. In these circumstances the court is unable to find that the cited case offers any amount of assistance to the determination of the present case.

[27] The other two cases cited by learned counsel for the appellants, namely, *Goodyear Tire & Rubber Company & Anor v. Silverstone Tire and Rubber Co Sdn Bhd* [1994] 1 CLJ 509; [1994] 1 MLJ 348 and *Eastern Book Company & Ors v. DB Modak & Anor* (2008) 1 SCC 1, a 2007 decision of the Supreme Court of India, both dealt with such issues as whether an author had put in sufficient skill, time and effort in creating the work and whether there was any material alteration or embellishment sufficient to make the edited work an original work. As in the other case of *Macmillan and Company* (*supra*), the facts of these cases can be distinguished from the facts of our instant case in that in our instant case there is no issue that both the original photographs as well as the edited photographs were the work of the respondent.

[28] Thus on this issue of whether the respondent is entitled to copyright of the two edited photographs, the court is of the considered view that she is entitled to copyright. The respondent was the photographer who had taken the original photographs. That by itself would entail a degree of skill and creativity to produce the original photograph. Thereafter, the respondent had, as per her evidence, used various computer programmes and techniques in order to improve on the photographs that she had taken. She had used Adobe Photoshop to bring out and improve on the colour, and used various tools to enhance the background, remove imperfections and generally to improve on the photographs.

[29] The court is unable to accept the appellant's contention that the respondent's efforts on P15 & P16 were too minimal to enable her to claim copyright. The court finds that the learned HMS's findings on this issue to be unimpeachable when he said:

> ... Defendant sendiri mengaku beliau bukanlah seorang yang tahu mengenai dunia fotografi dan beliau bukanlah pakar dalam bidang berkenaan ... Oleh kerana Defendan bukanlah seorang pakar fotografi, pada pengamatan mahkamah beliau bukanlah seorang saksi yang layak untuk memberikan keterangan berkait dengan fotografi dan menilai kualiti kerja dan kehalusan seni yang telah dihasilkan oleh Plaintif. Pihak Defendan perlu memanggil saksi pakar untuk memberikan keterangan berkait dengan isu sama ada usaha yang dilakukan oleh Plaintif adalah terlalu minima atau tidak.

[30] The court fully endorses the findings of the learned HMS that DW1 had, admittedly, no expertise in photography and as such would have no expertise on the quality and artistry of the respondent's work. The court finds that the respondent is an acclaimed and celebrated photographer in her own right where her photographic skills were sought after by many including by Puan Nurashikin binti Jamal. Based on the authority of *Sherinna Nur Elena Abdullah* (*supra*) and distinguishing the many authorities cited by the appellant, the court finds that the learned HMS was not in error when he found that the two edited photographs are eligible for copyright protection and that the respondent is the owner of the copyright.

Whether The Appellant/Defendant Had Infringed The Respondent's Copyright By Printing And Distributing The Two Photographs Without The Permission Or Approval Of The Respondent?

[31] It is the appellant's case that even if there was copyright in the edited photos, it is the wedding couple who are the initial copyright owners. Reference was made to s. 26 of the Copyright Act 1987 which reads as follows:

> (2) Notwithstanding subsection 27(6), where a work:
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> (a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or
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> (b) not having been so commissioned, is made in the course of the author's employment,
>
> the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, **subject to any agreement between the parties excluding or limiting such transfer**.
>
> (emphasis added)

[32] Learned counsel for the appellant has referred the court to the 1912 publication entitled *'Photographic Copyright'* by George E Brown and Alexander Mackie where the authors had referred to the case of *Boucas v. Cooke* (1903) 2 KB 227 which was a decision of the Court of Appeal given under the Act of 1862. The principles gleaned from that case is that even if nothing was actually paid, nor any specific amount agreed to be paid, for the taking of the photograph, if the photographer is in a position to sue for payment for the taking of the photograph, the copyright does not belong to him. Further in the case of *Yardley v. Houghton Mifflin Co, Inc* 108 F.2d 28 (1939), the Circuit Court of Appeals held as follows:

> The rule has been clearly laid down in this circuit that where a photographer takes photographs of a person who goes or who is sent to him in the usual course, and is paid for the photographs and for his services in taking them, the right of copyright is in the sitter or in the person sending the sitter to be photographed, and not in the photographer; but the photographer is entitled to copyright where he solicits the sitter to come to his studio and takes the photographs gratuitously for his own purposes and at his own expense. *Lumiere v. Robertson-Cole Distributing Corp.*, 2 Cir., 280 F. 550, 24 A.L.R. 1317, *certiorari* denied 259 U.S. 583, 42 S.Ct. 586, 66 L.Ed. 1075; *Lumiere v. Pathe Exchange*, 2 Cir., 275 F. 428; *Press Pub. Co. V Falk*, C.C.S. D.N.Y., 59 F. 324; see also *Cory v. Physical Culture Hotel*, 2 Cir., 88 F. 2d 411, photograph of inanimate object.

[33] Based on this, it is the appellant's contention that if there was any copyright in the photographs (which was not admitted), the copyright rests with the wedding couple because it was they who had commissioned the respondent to take and edit the photographs and had paid for the said photographs.

[34] On this issue, the court is unable to accept that the correct statement of the law in this country is the same as that stated in the book '*Photographic Copyright*' or in the cases of *Boucas v. Cooke* and *Yardley v. Houghton Mifflin* (*supra*). These are very old cases from different jurisdictions and there is nothing to show if the legal position applicable in those cases also applies in this country.

[35] In response to the above submission, the respondent submits that the appellant is mistaken as to what is the law on copyright as applicable in this country. Apart from s. 26 of the Copyright Act 1987 and the case of *Sherinna Nur Elena Abdullah* (*supra*), the respondent has drawn the court's attention to invoice (P12) that was issued to the customer Nurashikin binti Jamal (See pp. 183-184 of the Appeal Record). The court notes that at the bottom of p. 183, there is a note to the effect that 'terms and conditions apply'. The terms and conditions appear at p. 184. The court notes that cl. 9 of the terms and conditions which relate to copyright (with all its grammatical imperfections) reads as follows:

A (1) All photo taken from the event are considered the intellectual property of LOOKitLOVE. The client shall be entitled to use the images only for personal reason. Unless explicitly agreed and indicated in writing by LOOKitLOVE, the client shall not be entitled to pass on the images to any third party printed or shown in any form of media & publication.

B (2) The client hereby grants to LOOKitLOVE and its legal representatives and assigns, the irrevocable and unrestricted right to use and publish photographs of the client or in which the client may be included, for editorial, trade, advertising, and any other purpose and in any other manner and medium alter the same without C restriction and to copyright the same. The client hereby release LOOKitLOVE and its legal representatives and assigns from all claim and liability relating to the said photographs.

(3) **Transfer of Copyright – LOOKitLOVE shall transfer the copyright photos for the event covered to the client for a sum of RM 1000**.

D (emphasis added)

[36] Thus, applying s. 26(2) of the Copyright Act 1987 to the facts of our instant case, the copyright shall be deemed to be transferred to the client, Nurashikin binti Jamal, subject to any agreement between the parties E excluding or limiting such transfer. From the evidence of the respondent, the client had never bought the copyright to the photographs. The court is satisfied that the terms and conditions attached to the invoice clearly states that the photographs taken will be considered the intellectual property of LOOKitLOVE. The court is further satisfied that *vide* cl. 9, the agreement F between the client and the respondent excludes the copyright to the photographs passing to the client unless the client has paid the respondent RM1000, in which case the respondent would transfer the copyright to the photographs to the client.

[37] As such, the court finds that the learned HMS was not in error when G he found that since Nurashikin had not bought the rights to the copyright, the copyright to the photographs including P15 and P16 remained with the respondent.

[38] The court agrees with learned counsel for the respondent that the facts in the case of *Ultra Dimension Sdn Bhd v. Ketua Pengarah, Lembaga Penggalakan* H *Pelancongan Malaysia & Ors* [2010] 8 CLJ 245 can easily be distinguished from the facts of our instant case. In *Ultra Dimension (supra)*, there was contradicting evidence as to who had actually taken the photographs. The first version was that the plaintiff personally took the photographs. The second version was that a group of photographers were taking photographs I and the court was unable to make a finding as to who had actually taken the photographs. In the circumstances, the court in *Ultra Dimensi* (*supra*) found that the plaintiff had failed to prove on a balance of probabilities that he was the owner of the copyright.

[39] The aforestated facts are different from the facts of our instant case where the respondent (PW1), had taken the photographs herself and had edited the said photographs. There is evidence from the respondent as to her watermark 'LiL' on the photographs. The court agrees with the submissions of learned counsel for the respondent that the appellant had never, at any stage of the hearing, denied that the 'LiL' watermark belonged to the respondent. In the circumstances and based on the evidence adduced, the respondent was both the author as well as the owner of the copyright.

[40] And what did the appellant do in relation to the copyrighted photographs belonging to the respondent? From the evidence adduced, Nor Zulihaz binti Zulkifli (DW1), a director and owner of the appellant had admitted downloading the two photographs from the Facebook webpage of LOOKitLOVE Photography, cropping the photographs to include only the top portion of the photographs above the watermark 'LiL'. This cropping of the watermark would appear to be a deliberate act as DW1 had testified that:

> We ensured that the 'LiL' did not appear in our brochure so that there is no suggestion of any association between ourselves and the 'LiL' representing "LOOKitLOVE". We only promoted our own outfits.

DW1 had admittedly not obtained the permission of the respondent to do what she did. In fact, she had not even informed the respondent that she was going to include the said photographs in her brochure for the wedding carnival.

[41] The court notes that since the respondent's photographs were printed in the appellant's brochure and without the respondent's watermark, no one looking at the said photographs would be aware that the said photographs belonged to the respondent.

[42] In coming to his decision, the learned HMS had also considered the provisions of s. 25(2)(a) of the Copyright Act 1987 which reads as follows:

> (2) Subject to this section, where copyright subsists in a work, no person may, without the consent of the author, or, after the author's death, of his personal representative, do or authorise the doing of any of the following acts:
>
> (a) the presentation of the work, by any means whatsoever, without identifying the author or under a name other than that of the author; and

[43] The court finds that the learned HMS was not in error when he found that the appellant, by removing the respondent's watermark on the photographs or cropping the photographs so that the respondent's watermark would not appear on the photographs in the brochure, was aware that the copyright in the said photographs belonged to the respondent. And the court finds that the appellant was guilty of infringing the respondent's copyright by

A publishing the respondent's photographs in the wedding carnival brochure without her consent or without identifying the respondent as the author and copyright owner.

[44] The appellant had, in passing, sought to justify its actions in using the respondent's photographs by arguing that since the said photographs were
B downloaded from the respondent's Facebook webpage, the copyright had already been transferred to Facebook.

[45] The court is unable to find any basis or merit in this argument. As the court had found earlier, the copyright in the photographs did not vest in the wedding couple who were bound by the terms and conditions of their
C contract with the respondent. In summary, copyright vests with the respondent unless the client had bought over the copyright for a sum of RM1000. The copyright in the photographs which were loaded onto the respondent's Facebook webpage remained with the respondent. And Facebook had, in its statement of rights and responsibilities (D36) warned
D users not to "infringe or violate someone else's right or otherwise violate the law".

[46] As such and in line with the foregoing findings, the court finds that the learned HMS was not in error when he found that the appellant, by
E publishing the respondent's works in its wedding brochure, without consent, had infringed the respondent's copyright in the said photographs.

Remedies

[47] The court notes that the appellant in its notice of appeal had appealed against:

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(i) the order for a public apology on Facebook;

(ii) general damages of RM10,000;

(iii) aggravated damages of RM20,000; and

G (iv) costs of RM5113.

[48] However, the court notes that the appellant's notice of appeal does not reflect the court's decision where the court had maintained the award of RM10,000 for general damages and RM10,000 for aggravated damages and the apology in Facebook, but had set aside the award of RM20,000 for
H exemplary damages. This is clearly seen in para. (iv) of the court order dated 30 March 2015 where the court had set aside the HMS's award of RM20,000 for exemplary damages. As such, the appellant's appeal against a non-existent award of RM20,000 is clearly in error and the court will not be dealing with it.

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The Public Apology

[49] In respect of the public apology in Facebook, learned counsel for the appellant has submitted that the order for a public apology in Facebook is outside the jurisdiction of the Sessions Court. The respondent, on the other hand, has argued that since the appellant had commenced everything in Facebook, ie, downloading the respondent's photographs from the respondent's Facebook, it was only fit and proper for the appellant to tender a public apology to the respondent on the respondent's Facebook webpage.

[50] The court refers to the case of *Azhar Victor v. Malaysian Airlines System Sdn Bhd* [2012] 8 CLJ 563; [2012] a MELR 1 cited by learned counsel for the respondent where Suraya J had referred to the Court of Appeal case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 as follows:

> In the case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] CLJ 679, the Court of Appeal held that the prayer in the plaintiff's statement of claim for "other relief that this court deems fit and just" are not empty words and must not be treated as a mere ornament to pleadings devoid of any meaning. The said prayer was sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned judge. In Held 4 of the case, it states:
>
> > [4] There was no merit in the plaintiff's argument that the learned judge gave the plaintiff something he had not asked for. Equitable remedies and doctrines are flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts. Further, the prayer in the plaintiff's statement of claim for "other relief that this Honourable Court deems fit and just" was sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned trial judge.

[51] As an alternative argument, the respondent submits that the HMS's order for the appellant to tender a public apology in Facebook is not an unreasonable order and the court has the discretion to make such order which is not unreasonable. Since the appellant's actions in this case started when it downloaded the respondent's photographs from the respondent's Facebook webpage, it was only reasonable that the appellant be made to issue a public apology, also on the respondent's Facebook page.

[52] The court has considered the arguments of both parties in this regard. Once the court has found that there has been an infringement of the respondent's copyright by the appellant, the next order of the day would be to consider the remedies that could be awarded to the respondent as the party which had suffered as a result of the infringement. The court is of the considered view that in these days of the internet and social media, the publication of a public apology in the social media would serve as an effective way of assuaging the loss or hurt that the respondent had suffered

as a result of the infringement of her copyrighted work. Such an order made would be well within the jurisdiction and discretion of the court to order such relief that the court deems just and fair.

General Damages And Aggravated Damages

[53] The court had confirmed the sums of RM10,000 each for general and aggravated damages as awarded by the learned HMS.

[54] The appellant submits that the quantum of damages awarded was exorbitant. Among the reasons advanced in support of this submission are the following:

(i) the respondent has not shown any loss;

(ii) the respondent and the appellant are in different trades;

(iii) the value of the copyright as given by the respondent was only RM1,000;

(iv) only about 300 copies of the brochures were printed and they were only distributed in Bangi at the wedding carnival;

(v) the focus of the reproduced photographs was the outfit supplied by the appellant with the objective to promote only its own outfits; and

(vi) the respondent had not shown any injury to her feelings or her dignity to justify the award of aggravated damages.

[55] With regard to general and aggravated damages, the court need only refer to the case of *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals* [1995] 2 CLJ 912 where His Lordship Gopal Sri Ram JCA had quoted from the case of *Lachman v. Pyarchand* AIR 1959 Raj 169, at p. 175 which states as follows:

> Now, so far as this aspect of the case goes, I desire to say, first that damages are of two kinds: general and special, and the learned Civil Judge does not appear to have appreciated the distinction between them, and, second, that while special damages are required to be specifically pleaded and proved general damages are not.
>
> General damages are damages which the law presumes to flow from, and as it were be the natural and probable consequence of the defendants' act. Therefore **general damages need not be specifically nor need any evidence be produced to prove them** as such. I have no doubt that having regard to the pleading of the plaintiff in the present case, what he really claimed was general and not special damages.
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> (emphasis added)

[56] The court has also relied on the case of *Syed Ahmad Jamal v. Dato Bandar Kuala Lumpur* [2011] 2 CLJ 569 where Azahar Mohamed, J (as His Lordship was then) had held that in assessing damages it is important to consider the conduct of the defendant. The facts of the instant case have been

recounted earlier. There is little necessity in retelling them again. The actions of the appellant in downloading the respondent's photographs and cropping them to remove the watermark and then using them in its own brochure to advertise its wedding outfits would show the appellant's actions to be quite deliberate in nature. The appellant knew the photographs did not belong to them. If it had wanted to advertise its wedding outfits it could have done so by using professional models or even its own staff. The fact that the bridal couple had used the appellant's wedding outfits did not give the appellant the right to use such photograph of theirs dressed in the said wedding outfits.

[57] The court finds absolutely no merits in the appellant's argument that the value of the copyright is only RM1,000. The offer of a price of RM1,000 to transfer the copyright to the photographs taken was only applicable to Puan Nurashikin binti Jamal as the client who commissioned the photographs and bears no relationship to the amount of damages that could be awarded for the infringement of its copyright.

[58] Taking into account all the circumstances of the case and specially noting the conduct of the appellant, the court finds that the learned HMS was not in error when he awarded a sum of RM10,000 as general damages and a further sum of RM10,000 as aggravated damages and the court had therefore affirmed both awards. Although there is an appeal against an alleged award of RM20,000 for exemplary damages, the court does not intend to deal with it or at all as it did not award the same.